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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 439

HERLONG SIERRA HOMES, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE UNITED STATES OF AMERICA

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, dated and entered March 24, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 358 F.2d 300. The opinion of the District Court (Appendix B) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on March 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does federal or state law govern the dealings of private parties, the assignee of one such private party being the United States, in the seeking of a deficiency judgment after foreclosure of a mortgage loan?

2. Does a builder of a Wherry military housing project assume the risk, as the District Court found, that the Army will prevent or hinder performance of the contract?

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1748b(a) provides:

> "(a) In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided,* That the aggregate amount of principal obligations of all mortgages insured under this subchapter (except mortgages insured pursuant to the provisions of this subchapter in effect prior

to August 11, 1955) shall not exceed $2,300,000,000: *And provided further,* That the limitation in section 1715h of this title shall not apply to this subchapter: *And provided further,* That no mortgage shall be insured under this subchapter after June 30, 1958, except pursuant to a commitment to insure issued before such date."

28 U.S.C. § 1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U.S.C. § 1345 provides:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

Section 580(b), California Code of Civil Procedure, provides:

"No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.

"Where both a chattel mortgage or deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof."

STATEMENT OF THE CASE

The United States brought this action, under Title 28 U.S.C. § 1345, to foreclose a deed of trust held by the Federal Housing Authority (hereinafter referred to as FHA). The deed of trust secures a note in the amount of $1,113,700.00 given by Petitioner. The amount represents a loan acquired by Petitioner for the purpose of financing the construction of a rental housing project for military and civilian personnel at Sierra Ordnance Depot, a federal enclave located in an isolated area of Lassen County, California.

Negotiations leading to the financing of Petitioner's project were made pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. § 1702), and of the Act of August 8, 1949, known as the "Wherry Act" (Title 12 U.S.C. § 1748 *et seq.*). Because of a housing shortage existing at the Depot, its Commanding Officer requested the construction of some 456 dwelling units to house civilian and military personnel employed at the Depot, and the request was approved by the Headquarters of the Sixth Army and by FHA. Negotiations were carried on among the Department of Defense, FHA, and Housing and Home Finance Agency (HHFA, also a Federal agency) to obtain the construction of these units. The negotiations resulted in the issuance by the Defense Department, on October 24, 1951, of a certification to FHA that 125 units were necessary to provide adequate rental housing for Depot personnel; that the Depot was deemed a permanent installation; and that there was no present intention to substantially curtail activities at the Depot. Petitioner filed application, received approval, and undertook the construction of these units.

In order for the units constructed by petitioners to have met their costs, it had been determined that 92% occupancy would be required. Recognizing his responsibility under Army Regulations, the Commanding General of the Sixth Army adopted a policy designed to encourage the maximum occupancy of the units; in implementation of such policy, Commanding General, Sixth Army, directed his subordinate, Commanding Officer of the Depot, to take certain specified action to insure the requisite occupancy.

On March 3, 1955, Petitioner executed and delivered to the Manufacturers Trust Company its note, secured by a deed of trust on lands leased to Petitioner by the United States upon which the housing units were to be constructed together with the housing units thereafter constructed on the property. Repayment of the loan was insured by FHA, which is now the holder of the note and the deed of trust by assignment. Petitioner defaulted in payments due under the note, because actions of the Depot Commander precluded occupancy of the rental units despite the fact that all concerned knew that tenants could come only from the Depot and the project was built solely because existing Depot housing was found substandard by the Army. The United States instituted this action to foreclose the deed of trust. The District Court held (Conclusions of Law Nos. 1, 2 and 3): (a) plaintiff was entitled to foreclosure of the property; (b) federal law, and not California law, determines whether plaintiff would be entitled to a deficiency judgment if foreclosure sale should result in a deficiency; (c) applying federal law, plaintiff is entitled to a deficiency if proceeds from sale are insufficient to pay the amount due. The Court of Appeals affirmed. The

government purchased at the foreclosure sale for $500,000, and the deficiency found due the FHA insurance fund was in excess of $700,000.

ARGUMENT

The promissory note made by Petitioner and given to Manufacturers Trust Company as evidence of its indebtedness to repay a loan of $1,113,700 necessary to build the project was, by its explicit terms, to be construed according to the laws of California. FHA, as insurer, approved the terms of the note, as it had the right to do "upon such terms as the Commissioner may prescribe." 12 U.S.C. § 1748b(a). Here, all three parties and their counsel carefully worked out the terms of a loan in excess of a million dollars and all agreed that California law should apply in all respects, but the Courts below have determined that California law should not be applied. In so doing, several cases from federal courts were cited, but not the most recent applicable opinion of this Court. The most pertinent holding of this Court is *U.S.* v. *Yazell,* 382 U.S. 341, 15 L.Ed 2d 404, 86 S. Ct. 500 (1966). There this Court held that state law should apply where: (1) the note was negotiated with particular reference to state law: (2) it was a "custom-made, hand-tailored, specifically negotiated transaction"; (3) there is no need for uniformity in the circumstances; (4) there is absent any "federal statute, regulation or even any contract provision indicating that state law would be disregarded". All of these factors are here present and state law should likewise be followed. In addition, SBA was the lender in *Yazell,* while here FHA was only the insurer. Obviously there is a more direct federal interest where the government is the direct lender rather than

an insuror. Nor is there "a significant conflict between some federal policy or interest and the use of state law in the premises", *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 16 L. Ed. 2d 369, 373, 86 S. Ct. 1301 (1966), since there is no federal statute or expression of legislative intent authorizing collection of deficiency judgments, much less pre-empting state law on the subject.

The instant case is also marked by the fact that the party seeking to collect the deficiency judgment is a very sophisticated insurer which has accumulated an insurance premium reserve in excess of $35,000,000 as of June 30, 1964. It insures only when it approves the terms of the loan, including what law shall apply. Title VIII of the National Housing Act set up a statutory scheme to induce private enterprise to assume a partial risk in the construction of low-cost rental housing for the military and civilian personnel of the United States. The United States investment was protected by the real and personal property which secured the debt and the insurance premium fund. Petitioner has already lost all equity in the project and the insurance premiums have been paid. Could there be some compelling federal interest in sticking petitioner further with a deficiency judgment of over $700,000 not based upon any federal statute and contrary to the law of California which the promissory note said would control?

Title VIII of the National Housing Act nowhere mentions any right of FHA to obtain a deficiency judgment under federal or state law. In fact, the legislative history points the other way. In House Report 854, 81st Cong., the Banking and Currency Committee in explaining the purpose of the Wherry Act said:

> "The bill is designed to encourage them [builders] to construct such housing. Where housing is constructed with mortgage insurance under the bill, no cost to the Government would be involved unless, through deactivation or curtailment of military installations or other causes there are losses in excess of the premium and other payments by the mortgagee to the insurance fund.
>
> * * * * * *
>
> "As housing is insured under Title VIII, the fund would, of course, be augmented by deposits of fees and insurance premiums authorized to be collected under the bill, and, except in the event of unusual losses the fund should be self-sustaining."

No mention is made of obtaining deficiency judgments to augment the fund, and this is not surprising since some states forbid deficiency judgments. Surely had Congress intended the fund to be augmented by such judgments, it would have clearly spoken out and authorized this as a matter of national and uniform policy. Certainly it cannot be said that Congress has authorized the assignee of the mortgagee (FHA) to override state law where the mortgagee had agreed that the transaction was to be governed by state law. § 580 (b) of the California Code of Civil Procedure (p. 3 herein) clearly prohibits a deficiency judgment under these factual circumstances.

II

The District Court held "Defendant must be deemed to have assumed the risk of the actions taken by Colonel Leavitt and his staff insofar as they may have tended to preclude occupancy of defendant's units." The Court of Appeals approved of the District Court's statement. In a factual nutshell, the situation was:

(1) the Secretary of the Army found that existing housing facilities for personnel at this desolate Depot were inadequate and a danger to health and morale; (2) petitioner agreed to build 125 units under plans, specifications and drawings issued and approved by the Department of the Army and FHA; (3) under the law the units were reserved for Depot personnel under rents established by federal agencies; (4) the Project Analysis showed that 92% occupancy was needed to financially support the project; (5) Sixth Army advised the Depot Commander that an "aggressive program adopted to assure maximum occupancy" be instituted; (6) the Depot Commander replied expressing awareness of the "moral obligation and responsibility of the installation commander in securing maximum occupancy of the Wherry units"; (7) the installation commander then issued orders insuring that the necessary occupancy could not be achieved. Despite these actions petitioner borrowed an additional $375,000 to complete the project and all subcontractors were paid.

Is it the law and the intention of Congress that a builder of a Wherry housing project should assume the risk of the bad faith of subordinate officers? We know that in this case the United States is not liable for the action of such officer under the Tort Claims Act. 320 F.2d 425, cert. den. 376 U.S. 906. But there is nothing in the legislative history of the Wherry Act to support such an assumption of bad faith theory. On the contrary, House Report 854, *supra,* recognized that the builder could be at the mercy of the military:

> "Consequently, in analyzing proposed projects to provide housing for military personnel, the *FHA cannot disregard the special risks involved* by reason of the location and the question as to the permanent nature of the military installations.

> "The bill would amend the National Housing Act by providing for a new title establishing a system of mortgage insurance for rental housing to serve the personnel of military and naval installations on substantially the same basis as is now available under section 608 of Title VI. In view of the *special problems involved and the different risk characteristics* presented by such housing, an entirely new insurance fund is proposed for the operation of this new title." (Emphasis supplied.)

Is not the "entirely new insurance fund" with its unused premium reserves in excess of $35,000,000 the party who should assume the risk of bad faith of a subordinate commander rather than the builder which was powerless to prevent the loss of its investment in the face of such bad faith? With all its awareness of special risks, special problems and different risk characteristics would the Congress have ignored the inclusion of the builder assuming the risk of bad faith had it so intended? On the contrary, the Committee Report said, "The bill is designed to encourage them [builders] to construct such housing". The Courts below have interpreted this to mean that the Wherry housing builder must retroactively be deemed to have assumed the risk of governmental bad faith. Such a conclusion cannot be found in the statute, the common law or in common sense.

CONCLUSION

The action of the Court of Appeals in affirming the judgment of the District on the theories that petitioner assumed the risk of governmental bad faith and that federal law and not state law should apply under the circumstances of the case was erroneous. For all

of the foregoing reasons this petition for a writ of certiorari should be granted.

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August 12, 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,764

HERLONG-SIERRA HOMES, INC., a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

[March 24, 1966]

Appeal from the United States District Court
for the Northern District of California
Northern Division

Before: HAMLEY, MERRILL, and BROWNING, Circuit Judges

PER CURIAM:

This is an appeal from a judgment in an action by the United States to foreclose a deed of trust and chattel mortgage executed by appellant to secure a loan insured by the Federal Housing Administration under the authority of Title VIII of the National Housing Act, 12 U.S.C.A. § 1748b, in connection with the construction of a rental housing project for military and civilian personnel at the Sierra Ordnance Depot in Lassen County, California. An opinion of this court in related litigation is reported at 320 F.2d 425.

Appellant contends (1) that appellee is precluded from recovery because appellee's wrongful conduct prevented appellant from making the payments due on the note, and (2) that a deficiency judgment was barred by section 580(b) of the California Code of Civil Procedure. These contentions are sufficiently answered by the district court in its memorandum opinion of June 8, 1964. As to the latter, see also *United States* v. *Shiner*, 367 U.S. 374 (1961); *United States* v. *Rossi*, 342 F.2d 505 (9th Cir. 1965).

Appellant also contends that the district court should have made provision in the judgment against acceptance of an excessively low bid at foreclosure sale. It does not appear from the record before us that this issue was raised in the district court. In any event, we agree with appellee that "all that is before the Court now is the Judgment of Foreclosure and Order of Sale, not the sale itself." Nothing that the district court or this court has held would preclude the appellee from seeking relief in the district court on a showing that the high bid at the foreclosure sale was unreasonably low. *Cf. Magnolia Springs Apartments, Inc.* v. *United States*, 323 F.2d 726 (5th Cir. 1963).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civil No. 7735

UNITED STATES OF AMERICA, *Plaintiff*,

v.

HERLONG-SIERRA HOMES, INC., a corporation; WESTERN TITLE INSURANCE AND GUARANTY COMPANY, a corporation; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JANE DOE I, JANE DOE II, JANE DOE III, JANE DOE IV, DOE CORPORATION I, DOE CORPORATION II, DOE CORPORATION III, AND DOE CORPORATION IV, *Defendants*.

Memorandum and Order

The United States brought this action, under Title 28 U.S.C. § 1345, to foreclose a deed of trust held by the Federal Housing Authority (hereinafter referred to as FHA). The deed of trust secures a note in the amount of $1,113,700.00 given by Herlong-Sierra Homes, Inc. (hereinafter referred to as defendant). The amount represents

a loan acquired by defendant for the purpose of financing the construction of a rental housing project for military and civilian personnel at Sierra Ordnance Depot, a federal enclave located in an isolated area of Lassen County, California.

Negotiations leading to the financing of defendant's project were made pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. § 1702), and of the Act of August 8, 1949, known as the "Wherry Act" (Title 12 U.S.C. § 1748 *et seq.*). Because of a housing shortage existing at the Depot, its Commanding Officer requested the construction of some 456 dwelling units to house civilian and military personnel employed at the Depot, and the request was approved by the Headquarters of the Sixth Army and by FHA. Negotiations were carried on among the Department of Defense, FHA, and Housing and Home Finance Agency (HHFA, also a Federal agency) to obtain the construction of these units. The negotiations resulted in the issuance by the Defense Department, on October 24, 1951, of a certification to FHA that 125 units were necessary to provide adequate rental housing for Depot personnel; that the Depot was deemed a permanent installation; and that there was no present intention to substantially curtail activities at the Depot. Defendant filed application, received approval, and undertook the construction of these units.

On March 3, 1955, defendant executed and delivered to the Manufacturers Trust Company its note, secured by a deed of trust on lands leased to defendant by the United States upon which the housing units were to be constructed together with the housing units thereafter constructed on the property. Repayment of the loan was insured by FHA, which is now the holder of the note and the deed of trust by assignment. Defendant has defaulted in payments due under the note, and the United States has consequently instituted this action to foreclose the deed of trust.

Although the matter has not been pressed in subsequent arguments, defendant originally raised the defense that certain alleged acts of plaintiff made it impossible for defendant to make the payments on the note. Defendant contends that its duty to make the payments was thereby excused and that plaintiff is thereby estopped to bring the present action. The alleged acts of plaintiff were as follows: (1) that through its duly authorized agents and employees, plaintiff precluded military and civilian personnel from occupying the dwelling units of the project constructed by defendant; and (2) that FHA reduced rents for tenants in a nearby project (hereinafter referred to as Title IX units) and thereby enticed tenants away from the project constructed by defendant.

Specifically, the acts of the agents and employees of the Government referred to by defendant in its first contention are those of Colonel Leavitt (the Commanding Officer of the Depot) and his staff. These actions were the subject of another suit brought by defendant and Builders Corporation of America in this Court under the Federal Tort Claims Act (*Builders Corporation of America* v. *United States,* Civil No. 7250, affirmed in 320 F.2d 425).

Defendant's contention that tenants were enticed from its project by the reduction of rents in the Title IX units is simply not borne out by the record. FHA reduced the rents on the Title IX units sometime after April 20, 1956. The record shows that the occupancy of the defendant's units had dropped steadily in the ninth month period immediately preceding FHA's decision to lower the rents on the Title IX units. Defendant has introduced no evidence to indicate that the drop during the period from April, 1956, to August, 1956, was not a continuation of the decline which was occurring long before Title IX rents were reduced. Furthermore, there is no showing that those tenants leaving defendant's project moved into the Title IX units.

It is a general rule that if a promisor prevents the performance of a condition or promise which would have been performed except for such prevention or hindrance, the condition is excused (*United States* v. *Peck*, 102 U.S. 64; 3 Williston on Contracts § 677, pp. 1952, 1955; and Restatement of Contracts, § 295).

The general rule, however, is subject to certain exceptions. The rule does not apply when under the contract or the customs of business the risk of such prevention or hindrance as occurs is assumed by the other party (*Iron Trade Products Co.* v. *Wilkoff Co.*, 272 Pa. 172; 3 Williston on Contracts § 677, p. 1956; and Restatement of Contracts § 295(b)).

The Court has found nothing wrongful in the acts of Colonel Leavitt and his staff (See this Court's Memorandum and Order of July 5, 1962, in *Builders Corporation of America* v. *United States, supra*). Furthermore, the Government owed defendant no contractual duty to supply tenants for its housing project (See: *Henry Barracks Housing Corp.* v. *United States*, 281 F.2d 196).

Defendant went into this transaction with its eyes open. It was entirely foreseeable that the Depot Commander, in the exercise of his sound discretion and in compliance with orders, might refuse to give total support to defendant's project. Defendant must be deemed to have assumed the risk of the actions taken by Colonel Leavitt and his staff insofar as they may have tended to preclude occupancy of defendant's units. The Wherry Housing Act gives certain advantages to builders for the purpose of encouraging private investors to engage in the construction of rental housing for civilian and military personnel at military installations, but in no way does the Act attempt to relieve the builder of the burden of occupying its housing units. As stated in the *Henry Barracks* case, *supra*, at p. 201:

> "While the risk of loss from default was substantially shifted from the financing institution to the Government, thus enabling builders to more readily obtain financing for the contemplated housing, whether the project would continue to be profitable still involved a certain degree of gamble by the landlord on adequate occupancy, which is true of the operation of any rental real property."

The general rule excusing a condition when acts of the promisor have hindered or prevented its occurrence is subject to another exception which has application to the instant case. The general rule does not apply when "the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party" (Restatement of Contracts § 295(a)).

Colonel Leavitt's actions were motivated, in this case, by his feeling that there were certain structural deficiencies in the buildings. The Court is satisfied from the evidence adduced on this matter that Colonel Leavitt's actions were justified by actual deficiencies in the construction of defendant's buildings. Hence, defendant was not relieved of its duty to perform by plaintiff's actions.

Defendant raises the further defense that a deficiency judgment is precluded by California Code of Civil Procedure § 580(b).

It is unnecessary to determine whether under California law plaintiff would be entitled to a deficiency judgment. Federal law, rather than California law, must determine this question (See: *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Standard Oil Co.*, 332 U.S. 301; *McKnight* v. *United States*, 259 F.2d 540; and *United States* v. *View Crest Garden Apartments, Inc.*, 268 F.2d 380). The authority to insure payment on a note arose under the Constitution and statutes of the United States and was in no way dependent on the state laws.

In *McKnight* v. *United States, supra,* the Government brought suit against a veteran to recover a sum of money on a Loan Guarantee which the defendant had executed in connection with a loan for the purpose of purchasing a home. Defendant contended that the action was one for a deficiency judgment and hence barred by California Code of Civil Procedure § 580(b). The Court of Appeals (9th Cir.) held that the subject matter of the litigation arose under federal law and that the state statute was therefore not controlling.

Defendant contends that the Court should select the state rule as the applicable federal rule for this situation. However, in *McKnight* the Court refused to adopt the state anti-deficiency statute as the federal rule in a substantially similar situation. In *United States* v. *View Crest Garden Apartments, Inc., supra,* the Court restated its position in *McKnight* as follows, at p. 383, footnote 2:

> "This court . . . held that a local statute prohibiting deficiency judgments could not impair that remedy as far as the mortgage insured by the United States is involved."

State law has occasionally been selected as the applicable federal rule (See: *Royal Indemnity Co.* v. *United States,* 313 U.S. 289). Such a determination involves weighing the federal interest against the local policy (*United States* v. *View Crest Garden Apartments, Inc., supra*).

It is the federal policy "to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the (National Housing) Act—to facilitate the building of homes by use of federal credit. . . ." (*United States* v. *View Crest Garden Apts., supra,* at p. 383). On the other hand, the California Supreme Court has declared the state policy of the anti-

deficiency legislation to be as follows (*Bargioni* v. *Hill*, 59 Cal. 2d 121, 123):

> "The purposes are to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability."

This Court is of the view that the state's purposes are outweighed by the federal policy as it is stated in *View Crest Garden Apts.* and by the need for a uniform rule determining the Government's rights and duties on federally insured mortgages throughout the several states (Cf. *Clearfield Trust Co.* v. *United States, supra*). Accordingly, the federal rule entitles plaintiff to a deficiency judgment.

In light of the stipulation filed in this case on May 22, 1964, the Court makes no decision on the counterclaim asserted by defendant.

Let judgment be entered in favor of the plaintiff in this action. Plaintiff will prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the final disposition of this case in accordance with this Memorandum and Order and lodge them with the Clerk of this Court in accordance with the applicable rules and statutes.

DATED: June 8, 1964.

SHERRILL HALBERT
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,764

HERLONG-SIERRA HOMES, INC., a corp., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Judgment

APPEAL from the United States District Court for the Northern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 24, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 439

HERLONG SIERRA HOMES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was instituted by the United States to foreclose a deed of trust executed by petitioner in favor of the Manufacturers Trust Company of New York. The deed of trust was given to secure a $1,113,700 loan to petitioner "for the purpose of financing the construction of a rental housing project for military and civilian personnel at Sierra Ordnance Depot," Lassen County, California (Pet. App. B 3a). "Negotiations leading to the financing of [petitioner's] project were made pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. 1702), and of the Act of August 8, 1949, known as the Wherry Act (Title 12 U.S.C. 1748 *et seq.*)" (Pet. App. B 3a). The Wherry Act was substantially modified by the Capehart Act in 1955

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(Act of Aug. 11, 1955, ch. 783, Title IV, § 401, 69 Stat. 646, 650.) However, construction of military housing under those two Acts has ended owing to the absence of necessary implementing legislation.

The Wherry Act created a Military Housing Insurance Fund for the use of the Federal Housing Commissioner "to assist in relieving the acute shortage * * * [of] housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations * * *" 12 U.S.C. 1748b. The Act authorizes the Commissioner "upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon" *Ibid.*

Pursuant to that Act, the Department of Defense filed a certification with the FHA as to the need for the construction of rental housing units in the vicinity of the Sierra Ordnance Depot. Thereafter, the Manufacturers Trust Company obtained an insurance commitment from the FHA and subsequently, with the approval of the Commissioner, granted a loan to petitioner. Following petitioner's default, Manufacturers Trust assigned the note and deed of trust to the FHA and this foreclosure proceeding was instituted.

By way of defense petitioner contended that its default was excusable because agents of the United

States had wrongfully prevented it from fulfilling its obligation under the loan. Alternatively, petitioner argued that the recovery of a deficiency judgment was barred by California law. The district court rejected both of these contentions. As to the former, it considered in detail the challenged acts of the government agents but "found nothing wrongful" (Pet. App. B 5a). As to the latter, it concluded that federal law, not state law, governed, and that under federal law a deficiency judgment could appropriately be entered following the foreclosure sale (Pet. App. B 8a). The court of appeals affirmed *per curiam* (Pet. App. A, 1a–2a).

1. Petitioner's contention that it should be excused from its default is bottomed on the assertion that the commanding officer of the Sierra Ordnance Depot and officials of the FHA were guilty of bad faith in actions they took which allegedly frustrated petitioner's ability to meet its loan obligation.[1] Thus it is suggested that the United States is estopped because the base commander, Colonel Leavitt, discouraged military and civilian personnel from occuping petitioner's units by disclosing construction deficiencies. The district court found that "Colonel Leavitt's actions were motivated, in this case, by his feeling that there were certain structural deficiencies in the buildings. The Court is satisfied from the evidence adduced on this matter that Colonel Leavitt's actions were justified by actual deficiencies in the construction of [petitioner's]

[1] Those acts formed the basis of a prior unsuccessful endeavor to secure a Federal Tort Claims Act recovery. See *Builders Corporation of America* v. *United States*, 320 F. 2d 425 (C.A. 9), certiorari denied, 376 U.S. 906.

buildings. Hence, [petitioner] was not relieved of its duty to perform by plaintiff's actions" (Pet. App. B 6a). Similarly, petitioner urged below that it was relieved of its duty under the mortgage because Colonel Leavitt required some 12 members of his staff to live in government owned housing. But the trial court found that "This action of Col. Leavitt was taken because he wanted these employees to be available to him by telephone at all times, and telephones were not available to them in Title VIII units. This action by Col. Leavitt was entirely proper. Additionally, there is no evidence that more than two of the twelve employees would have occupied Title VIII housing had such orders not been given" (Findings of Fact, No. 10).

With regard to the officials of FHA, petitioner alleged that they had enticed tenants away from its development by lowering rentals at a neighboring project. The district court found that this allegation "is simply not borne out by the record. FHA reduced the rents on the Title IX units sometime after April 20, 1956. The record shows that the occupancy of the [petitioner's] units had dropped steadily in the ninth [*sic*] month period immediately preceding FHA's decision to lower the rents on the Title IX units. [Petitioner] has introduced no evidence to indicate that the drop during the period from April, 1956, to August 1956, was not a continuation of the decline which was occurring long before Title IX rents were reduced. Furthermore, there is no showing that those tenants leaving [petitioner's] project moved into the Title IX units" (Pet. App. B 4a).

Thus, in asking this Court to review the refusal of both courts below to excuse its default, petitioner predicates his argument on a factual assertion that he failed to establish. Furthermore, nothing in the legislative history of the Wherry Act, cited by petitioner (Pet. 9–10), suggests that Congress sought to relieve home builders of the risks inherent in the construction of rental housing at military installations. Quite plainly the purpose of providing federal mortgage insurance was to facilitate mortgage financing notwithstanding those risks.

2. Petitioner's principal contention is that the courts below erred in indicating that federal law, rather than state law, was controlling on the question of whether a deficiency judgment could be entered following a foreclosure sale. That question does not merit further review since only the foreclosure order was properly before the court of appeals. Indeed, although the district court opinion contemplated the entry of a deficiency judgment, the foreclosure did not occur and the deficiency judgment was not entered until after the court of appeals rendered its decision. Petitioner noted an appeal from the deficiency judgment on July 8, 1966.

In any event, federal law does control. In an endeavor to bring itself within the ambit of this Court's decision in *United States* v. *Yazell,* 382 U.S. 341, petitioner argues that "[h]ere, all three parties and their counsel carefully worked out the terms of a loan in excess of a million dollars and all agreed that California

law should apply in all respects * * * " (Pet., p. 6).[2] But in point of fact the revelant documents do not support that suggestion. To be sure, the mortgage note does state that it "is to be construed" in accordance with the law of California. But that general reference to State law does not purport to bear on the question of the propriety of a deficiency judgment. That reference resolves conflicts between private parties as to the choice of the applicable State law in areas where State law may properly be applied. Here the note was executed by a Nevada corporation, in favor of a New York bank and was secured by California property. Unless the private parties agreed on the State whose law was to govern (in situations where State law applies) serious conflict problems could result. But whether or not the United States is entitled to a deficiency judgment when the proceeds of a foreclosure sale are insufficient to satisfy a debt owed the federal treasury certainly is not the kind of question that should be subjected to the vagaries of divergent State law. See *Clearfield Trust Co.* v. *United States,* 318 U.S. 363. The United States has consistently been held entitled to the advantages of federal law in federally insured housing loans, including deficiency judgments in States which have statutes barring such judgments. *E.g., United States* v. *Shimer,* 367 U.S. 374; *McKnight* v. *United States,*

[2] The applicability of *Yazell* was not argued before the Ninth Circuit (Pet. 6). We assume that in their pending appeal from the deficiency judgment petitioner will make the argument which it is endeavoring to assert for the first time to this Court.

259 F. 2d 540 (C.A. 9); *United States* v. *View Crest Garden Apts.*, 268 F. 2d 380 (C.A. 9); *United States* v. *Helz*, 314 F. 2d 301 (C.A. 6). In *Yazell*, of course, the Court was concerned with a Small Business Administration loan which "was individually negotiated in painfully particularized detail * * * with specific reference to Texas law" (382 U.S. at 345–346). As the Court noted, the FHA, in contrast to the SBA, "issues separate forms for each State but does not negotiate with individual applicants" (382 U.S. at 348, fn. 15).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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